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IN THE

Supreme Court of the United States

October Term, 1962

No. 906

In the Matter of the Application
of
ANTONIO FINOCCHIARO,

Petitioner,

against

JOSEPH P. KELLY, Commissioner of Motor Vehicles,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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We oppose the granting of the petition for the reasons that the decision of the Court of Appeals (11 N. Y. 2d 58) rests on a non-Federal ground adequate to support it and the alleged Federal question lacks substantiality.

Statement

On the night of May 31, 1958, State Trooper Ralph A. Wulff was proceeding on Route 104 in the Town of Webster, New York, when he observed petitioner, Antonio Finocchairo, operating a truck thereon. The road consisted of three lanes. The truck swerved from the right hand lane to the center lane and then back again to the right hand lane; the driving was erratic. Petitioner stopped

his vehicle at a red light; it was in the middle of the right hand lane. The trooper ordered petitioner to pull over to the shoulder of the road. Finally, he did so. The trooper detected the odor of alcohol on petitioner's breath. Petitioner could not stand; "he kind of fumbled a little bit, he kept swaying back and forth; his eyes were watery and glassy; argumentative; not cooperative one moment and the next moment he would be" (31-35)*. He was incoherent (44).

The trooper arrested petitioner, charging him with driving while intoxicated. He took him to the State Police substation in Webster and asked him to take a blood test. Petitioner replied he would not do so without talking to his lawyer. He did not say he would take the test if his lawyer advised him to do so (35-36, 44).

Following a hearing, at which petitioner was represented by counsel, the Commissioner of Motor Vehicles revoked petitioner's license for refusing to take the blood test.

Petitioner informed the Appellate Division that he was acquitted of the criminal charge.

ARGUMENT

1.

The right to counsel mandated by the Federal Constitution applies to criminal proceedings only and not to a civil administrative proceeding such as this.

Beyond question, this proceeding to review a license revocation is a civil one. In his brief in the Court of Appeals, petitioner conceded that he made no claim that the

* Folio numbers of Record.

instant matter was anything other than an administrative proceeding. The right to counsel vouchsafed by virtue of the Sixth Amendment relates solely to criminal proceedings. In the instant matter petitioner successfully defended the criminal charge. He appeared with and was represented by counsel at the motor vehicle hearing.

Petitioner has suffered no infringement of a Federal constitutional right.

In Re Groban, 352 U. S. 330 (1957);
Smith v. *General Truck Drivers, etc., Union Local*, 181 F. Supp. 14 (U. S. Dist. Ct., S. D. Cal., 1960).

2.

The determination of the Court of Appeals that petitioner refused to submit to the blood test constituted an adequate, non-federal ground for its decision.

Whether petitioner's conduct upon the occasion of the state trooper's request that he submit to the blood test constituted a refusal within the New York statute is purely a non-federal question. The Court of Appeals has decided this question adversely to petitioner. In these circumstances, this Court will not review the decision of the State court.

Fox Film Corp. v. *Muller*, 296 U. S. 207 (1935);
Berea College v. *Kentucky*, 211 U. S. 45, 53 (1908).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Albany, New York, May 3, 1962.

Respectfully submitted,

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